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No. 376.

Brief of Rogers for P. E.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

D. P. TARPEY,
Plaintiff in Error,

vs.

ANDREW MADSEN,
Defendant in Error.

Brief of Plaintiff in Error.

L. R. ROGERS,
Attorney for Plaintiff in Error.

Filed this ..... *day of* ..... *1898.*

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D. P. TARPEY,
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Defendant in Error.

Reg. No. 16,961.

Brief of Plaintiff in Error.

This case comes here by writ of error to the Supreme Court of the State of Utah.

STATEMENT.

The case is in *ejectment*, to recover possession of one hundred and sixty acres of land in Utah, part of an odd-numbered section within the limits of the land-grant made to the Central Pacific Railroad Company of California by the Acts of Congress approved on July 1st 1862 (12 Stat. 489) and

July 2nd 1864 (13 Stat. 356); and is based on the plaintiff's (plaintiff in error here) claim of ownership by title in fee, under mesne conveyance from the said grantee Company (Tr. p. 1, fo. 1, 2).

Plaintiff's title.

The congressional Act of July 1st 1862, hereinbefore referred to, authorized the Central Pacific Railroad Company of California to construct a railroad from Sacramento to the eastern boundary of California (Sec. 9); and to aid in the construction thereof section 3 of the said Act provided:

> "That there be, and is hereby, granted to the said Company, * * * every alternate section of public land, designated by odd-numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a *pre-emption* or homestead *claim may not have attached*, at the time the line of said road is *definitely fixed:* Provided, that all mineral lands shall be excepted from the operation of this Act."

The Act of July 2nd 1864, hereinbefore referred to, authorized the Central Pacific Railroad Company to continue its railroad eastward to the Missouri River, or until it connected with the constructed road of the Union Pacific Railroad Company (Sec. 9). Section 4 of this Act enlarged the

land grant made by the Act of 1862—but such enlargement is immaterial here, as the land in suit lies within the limits of the grant made by the Act of 1862 (Tr. p. 7, 6th Item). The same section (4) of the Act of 1864 also provides that

> "Any lands granted by this Act, or the Act to which this is an amendment, shall not *defeat or impair* any *pre-emption*, homestead, swamp land, or other lawful *claim*, nor include any Government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands."

The Central Pacific Railroad Company was duly incorporated, empowered to construct the railroad contemplated, and authorized to receive the land-grants made by the said congressional Acts (Tr. pp. 6, 7 fo. 11).

Within the time allowed therefor the said Company duly assented to the Act of 1862, definitely fixed its railroad from Sacramento to a point near Ogden, and filed maps of the definite location thereof with the Secretary of the Interior. The land in suit is opposite, and co-terminous with, that portion of the road extending from Monument Point to Ogden; the map of the definite location of which was accepted and approved by the Secretary of the Interior on *October 20th 1868* (Tr. p. 7, fo. 12).

The land in suit was surveyed in 1856 (Tr. p. 8, fo. 14), and a plat thereof filed in the United States

land-office at Salt Lake City during the year 1869; and at the date the said Company definitely fixed the section of its railroad opposite thereto (October 20th 1868), the land in suit was not within any exception to the land-grant made by the congressional Acts of 1862 and 1864 (Tr. p. 7, fo. 13).

Thereafter the Central Pacific Railroad Company became the owner of the land grant made by the said Acts to the Central Pacific Railroad Company of California (Tr. p. 7, fo. 12); and on November 4th 1884 the Central Pacific Railroad Company was permitted to and did select the land for patent, and pay all the costs and fees of surveying and patenting the same (Tr. 8, fo. 14).

The Central Pacific Railroad Company sold and conveyed the land to the plaintiff, by deed dated August 17th 1891 (Tr. p. 10, fo. 17).

Defendant's title.

The United States land-office at Salt Lake City was not opened until April or May 1869 (Tr. p. 8, fo. 14)—five or six months after the Central Pacific definitely fixed the section of its road opposite the land in suit.

The Salt Lake land-office records show a pre-emption declaratory statement in the name of Moroni Olney, for the land in suit, dated May 29th 1869; wherein benefit of settlement is *claimed* from April 23rd 1869 (Tr. p. 9, fo. 15).

On January 20th 1896 the defendant filed his homestead claim for this land (Tr. p. 8, fo. 14); and such proceedings were had in pursuance thereof as that on August 21st 1896 a patent was issued by the United States purporting to convey the land in suit to the defendant (Tr. pp. 8, 9, fo. 14, 15). In the contest between the Central Pacific Railroad Company and the defendant Madsen, initiated by the said homestead filing of Madsen, the land-officers of the United States found and decided as follows:

> "We find that the tract in question * * * was settled upon and occupied and claimed by a qualified entryman, to-wit, Moroni Olney, prior to October 20th 1868; which therefore excepted the land from the operation of the grant of Congress to the Central Pacific Railroad Company."

The defendant's patent, issued in pursuance of his homestead and under authority of this decision, was offered in evidence upon cross-examination of plaintiff's witness Byron Groo, Register of the Salt Lake land-office. The plaintiff objected to its admission, the Court admitted it in evidence against the objection, and the plaintiff excepted (Tr. p. 9, fo. 15). Thereafter the plaintiff moved to strike the patent from the record, the Court denied the motion, and the plaintiff excepted (Tr. p. 10, fo. 17); and thereupon the defendant's motion for judgment of non-suit was allowed, ren-

dered and entered—to which the plaintiff excepted (Tr. p. 11, fo. 18).

ERRORS ASSIGNED.

Unless the occupancy and declaratory statement of Moroni Olney excepted this tract from the land-grant made to the Central Pacific by the congressional Act of July 1st 1862, the plaintiff's grantor, by *definitely fixing* its railroad on *October 20th 1868*, perfected title in fee to the same, which attached as of the date of the grant (July 1st 1862), and cut off intervening claims (if, otherwise, any existed); hence, unless this tract was so excepted, the defendant's patent was *void*, for that the United States *had no interest to transfer*.

The plaintiff claims that the tract in suit is not within any exception to, but was granted by, the said Act; and that, therefore, the trial Court erred in **(a)** admitting the defendant's patent in evidence; **(b)** over-ruling the plaintiff's motion to strike the said patent from the record; and (c) granting the defendant's motion for a non-suit. And the plaintiff claims that the Supreme Court of Utah erred

1st. In deciding that the title to the land in suit did not pass to the Central Pacific Railroad Company of California by the congressional Acts of July 1st 1862 (12 Stat. 89) and July 2nd 1864 (13 Stat. 356).

2nd. In deciding that the tract in suit was excepted from the land-grant made by the said Acts of Congress, by the settlement, residence, cultivation and filing of Moroni Olney.

3rd. In deciding that the tract in suit was public land of the United States, subject to the defendant's homestead at the time it was made.

4th. In deciding that the patent from the United States to the defendant, conveyed the title, or any title, for the said land.

5th. In affirming the judgment of the trial Court.

THE FEDERAL QUESTIONS.

The writ of error here is to the Supreme Court of the State of Utah, the highest Court of that State in which a decision in the case could be had, to correct a final judgment of that Court, in a case wherein the plaintiff specially set up a title to the land in suit under statutes of the United States; and the decision is against the title so set up.

The record shows that the plaintiff specially set up title in himself by mesne conveyance of the land in suit from the Central Pacific Railroad Company of California, to which Company a land-grant was made by the Acts of Congress approved July 1st 1862 (12 Stat. 489) and July 2nd 1864 (13

Stat. 356); the plaintiff claiming (which claim was specially set up throughout) that under the true construction of the said Acts a fee title to the land involved was granted by them to his grantor Company—whereas the decision and final judgment for review herein is against the plaintiff's title, through (as plaintiff claims) an erroneous construction of those Acts of Congress.

The federal questions thus arising are

1st. Is the tract in suit excepted from the land-grant made by the said Acts, by the record of a pre-emption declaratory statement filed on May 29th 1869, designating this land and April 23rd 1869 as the date of settlement *claimed* (the railroad having been definitely fixed on October 20th 1868)?

2nd. Is this tract excepted from the said land-grant because *settled upon* and occupied by Moroni Olney prior to the date the railroad was definitely fixed—notwithstanding his filing *did not claim* the benefit of settlement prior to April 23rd 1869?

ARGUMENT.

Nature of plaintiff's grant.

The grant under which the plaintiff claims, conferred by the words "*there be, and is hereby granted,*"

transferred an *immediate interest* in such odd-sections within the prescribed distances of the contemplated railroad when "definitely fixed," as were not by the terms of the Acts excepted or reserved from the lands granted **(U. S. v. S. P. R. R. Co., 146 U. S. 570)**; and the interest thus transferred was a *legal title*, which will maintain ejectment **(Deseret Salt Co. v. Tarpey, 142 U. S. 241)**.

Until the railroad was "definitely fixed" it could not be known what particular sections were granted, or what particular sections were reserved from the grant; as the railroad when "*definitely fixed*" established the line from which the grant was to be measured, and the date at which the *exceptions* from the grant *became operative*. In other words, definite location of the road fixes the boundaries of the grant, identifies the lands granted and the lands excepted within those limits, and attaches the grant to the odd-sections within those limits and not excepted from the grant, as effectually as if such un-excepted sections were specifically described in the granting Act **(Mo. R'y Co. v. Kans. Pac., 97 U. S. 491)**.

The sense of which, applied to this case, is, that by the definite location of its road, on *October 20th 1868*, the Central Pacific fixed the boundaries of its grant under which the plaintiff claims, *identified* the odd-sections (both *granted* and *excepted*)

within those limits, and on that day perfected in itself a *legal title* to such odd-sections within the granted limits as were not on that day included by an exception from the lands granted; which title *attached*, by relation of dates, as of the date of the granting Act, "so as to cut off all intervening claimants, except in the case where reservations were specially made in the Act" **(Mo. R'y Co. v. Kans. Pac., 97 U. S., 491).**

Exceptions in the Act of 1862.

The Act of July 23rd 1866 (14 Stat. 210) granting lands to the State of Kansas in aid of railroad building, expressly excepts from the grant lands to which "the right of pre-emption or homestead *settlement* has attached" at the date the road is definitely fixed; and a large number of the railroad land-grants, in words of similar import, reserve lands found *occupied by settlers* at the time of definite location, from the operation of the grant.

But the Central Pacific Act of 1862 contains no exception of lands to which the right of *settlement* may have attached, nor reservation of lands occupied by settlers, at the time of definite location; the corresponding provision of the Central Pacific Act under consideration is an exception from the grant of lands "to which a *pre-emption or homestead claim* is found *attached* at the time the line of said road is definitely fixed."

The decision of this case, therefore, goes with the true answer to the question, Was "a pre-emption or homestead *claim* found *attached*" to the land in suit on October 20th 1868, the time the line of railroad was definitely fixed?

The terms of the statute are absolute—not qualified, or left in anywise dependent upon contingencies; and the answer to this question must be found in the *facts existing on October 20th 1868*—not in what did, or might have, happened afterward. If on that day a "pre-emption *claim*" had "attached" to it, the land was thereby excepted from, and no title could thereafter be acquired to it under, the Central Pacific's grant; and if on that day a "pre-emption *claim*" was not found "*attached*" to it, title in fee for the land passed to the Central Pacific, as of the date of its grant, and all intermediate claims that might otherwise be filed thereafter were cut off. The definite location of its road vested a fee title in the Company to the lands to which a pre-emption claim was not at that time attached; and there was no provision in the Act that a pre-emption claim, if filed thereafter, should operate a defeasance of, or otherwise divest, the title vested by definite location.

The record shows that no filing, of any kind, existed for the land on October 20th 1868—but that on May 29th 1869 the Moroni Olney pre-emp-

tion statement was filed, designating the land in suit for a pre-emption claim, and April 23rd 1869 as the date of settlement *claimed*; the date of filing being seven months, and the date of settlement six months, *after* definite location of the Company's road. This is the pre-emption *claim* declared by Olney, who best knew when it originated, for himself; and it is absurd to say that such filing, made in May 1869, had "attached" in October of the year before.

Olney's filing was made under, and derives its significance from, Section 2265 of the United States Revised Statutes—taken from the pre-emption Act of 1841; which section requires the pre-emption claimant to file a written statement of his claim, "giving the designation of the tract and time of settlement." It reads as follows:

> "Every claimant under the pre-emption law for land not yet proclaimed for sale, is required to make known his *claim* in writing to the register of the proper land-office, within three months from the time of settlement, giving the designation of the *tract* and the *time of settlement*; otherwise the claim shall be forfeited" etc.

Exercising the authority conferred by this section, on May 29th 1869 Olney made "known his *claim* in writing," designating the land in suit as the "tract" claimed, and April 23rd 1869 as "the

time of settlement" claimed; and until the filing of that declaratory statement in the proper land-office there was no "pre-emption *claim*" to have "attached." It is said that as Olney was occupying the land on October 20th 1868, he *might* have claimed settlement on that day. True, but it is the *claim he did file*, not a claim he might have but did not file, that is to be considered—he might have designated other *land*.

It will be remembered that this is an *action at law* between the Central Pacific's grantee and the defendant Madsen, who is a stranger to and makes no claim of privity with Olney or his filing; it is not a proceeding wherein Olney is seeking to reform the record of his claim, or equitable relief from consequences of delay in filing, or mistake in date of settlement claimed. Olney, with free hands, made known his claim—and he was content with it as made; but the defendant, a stranger, years after the plaintiff had purchased the land from the Central Pacific on the face of the record of Olney's claim, bears witness that Olney settled prior to October 20th 1868, instead of as claimed by him in his declaratory statement—and upon that proof the land-officers patented the tract to the defendant. But, as before said, this is an action at law, wherein the *record* of Olney's *claim* stands as he made it—filed on May 29th 1869, claiming settlement on April 23rd of that year;

and if it be true (as we contend) that the *record*, the filing, is the "pre-emption *claim*," then it is immaterial when Olney settled—for settlement not "made known" by filing in the land-office would not constitute a pre-emption claim.

In Kans. Pac. v. Dunmeyer, 113 U. S. 644, Mr. Justice Miller, construing the words of the exception under consideration here, said:

> "Of all the words in the English language, this word '*attached*' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land-office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land."

This language was quoted and the decision reaffirmed, in **Hastings etc. v. Whitney, 132 U. S. 357**; and **Whitney v. Taylor, 158 U. S. 85.** See also **Gonzales v. French, 164 U. S. 338**; **Nor. Pac. v. Colburn, 164 U. S. 383**; and **Buxton v. Traver, 130 U. S. 232.**

In the early case of **Lansdale v. Daniels, 100 U. S. 116,** considering the necessity for and effect of the filing, it was held that

> "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor; the rule being that his settlement alone is not sufficient for that purpose."

In **Whitney v. Taylor, 158 U. S. 94,** after quoting with approval the matter herein quoted from Lansdale v. Daniels and Kans. Pac. v. Dunmeyer, the Court said:

> "And the acceptance of such declaratory statement, and noting the same on the books of the local land-office, is the official recognition of the pre-emption claim."

These cases clearly establish the rule that until a filing is made and accepted, there is neither pre-emption right nor "*pre-emption claim;*" and that until filing and acceptance of the declaratory statement, a "pre-emption claim" is not "attached." According to the authority of these cases the only claims of which cognizance can be taken, as excepting lands from the railroad grants considered, are claims *of record;* and this case illustrates the mischievous effect of a rule that would permit third parties, seeking to secure lands for themselves, to *change the record* by their own testimony. Such a rule would be a bid for false testimony, and lead to litigation and confusion of titles.

Definite location of the railroad on October 20th 1868 *identified* the lands granted and the lands excepted from the grant; and on that day legal title for this tract did or did not pass to the Central Pacific. If granted, it on that day became private property, not subject to pre-emption filing—hence

no "pre-emption claim" could thereafter attach to it.

As held in the cases cited, there could be neither pre-emption claim nor pre-emption right until filing was made—and here there was no filing on October 20th 1868. In other words, title to this land was vested on October 20th 1868, in either the Government or the Central Pacific—it was not in *suspense;* and if on that day it vested in the Central Pacific, the subsequent filing of Olney's declaratory statement could not, *ex post facto*, operate condemnation, forfeiture or defeasance of that title.

According to the theory of the Supreme Court of Utah, from October 20th 1868 (definite location) to May 29th 1869 (Olney's filing), the title to this land was *in nubibus*—vested in nobody—a derelict; suspended, like Mahomet's coffin. This theory arose out of the effect which the Court erroneously gave Section 2270 of the Revised Statutes, coupled with the gratuitous assumption that Olney *wanted* to file, *and would* have filed on or before October 20th 1868, but for that the land-office was not opened until April. When, on May 29th 1869, Olney filed, he *claimed* the benefit of settlement on April 23rd 1869, and asserted no claim to the land by reason of anything he had done back of that date. Prior to April 23rd his intentions may have been to pre-empt other land the was not obliged to

pre-empt this land), or to purchase this land from the Central Pacific (he alone could know when he first concluded to pre-empt); and in the absence of proof that he would have filed before the grant attached had the land-office been open, the natural and legal *presumption* is that he would not, in any event, have filed *prior to April 23rd 1869*—the date *claimed* in the filing, when made, for the initiation of his "pre-emption claim."

Section 2270 of the Revised Statutes provides, that

> "Whenever the vacancy of the office either of register or receiver, or of both, renders it impossible for the claimant to comply with any requisition of the pre-emption laws within the appointed time, such vacancy shall not operate to the *detriment of the party claiming*, in respect to any matter essential to the establishment of *his claim;* but such requisition must be complied with within the same period after the disability is removed as would have been allowed had such disability not existed."

This is a statute for the benefit of a pre-emptor seeking "the establishment of *his claim*," and to be relieved against "the detriment" that he might otherwise suffer because of vacancy in the land-office—it is not a statute for *third parties;* and *Olney* is not seeking, nor did he ever seek, "the establishment of his claim" otherwise than as he *did establish it*, by the declaratory statement filed. Olney filed his declaratory statement, and *rested.*

He never sought to establish any claim other than that "made known" by his filing—nor to be relieved from "detriment" suffered; but rested, satisfied with his filing.

It was successfully urged before the Supreme Court of Utah, that the Salt Lake Land-Office *ought* to have been opened prior to October 20th 1868; that Olney, being on the land, *ought* to have, and had the land-office been opened might have, filed before October 20th 1868; and as "Equity looks upon that as done which ought to have been done," therefore Olney's filing must be treated *as if* made prior to that date. The maxim has no application here—for obvious reasons.

Explaining this maxim, **Story's Eq. Jur. (13th Ed.), Sec. 64-g,** says:

> "The true meaning of this maxim is, that equity will treat the subject-matter as to collateral consequences and incidents, in the same manner as if the final acts *contemplated by the parties* had been executed exactly as they ought to have been, not as the parties might have executed them. But equity will not thus consider things in favor of all persons, *but only in favor of such as have a right to pray that the Acts might be done.*"

There is no evidence that the opening of the land-office at an earlier date than it opened, was "*contemplated by the parties:*" or that the parties, or any of them, "*contemplated*" that Olney would file prior to October 20th 1868; nor are "*the par-*

ties" to Olney's settlement or filing (Olney and the United States) before this Court; nor is this a case in which *equitable relief* could be extended.

> "What ought to be done is considered in equity as done; and its meaning is, that whenever the holder of property is *subject to an equity* in respect of it, the Court will, *as between the parties*, treat the subject-matter as if the equity had been worked and was impressed with the character which it would then have borne."
>
> **(Tiedman's Eq., Sec. 20.)**

Pom. Eq. Jur., Sec. 365 explains that it applies

> "To every instance where an *equitable ought* with respect to the subject-matter rests upon one towards another; to every kind of case where an affirmative equitable duty to do some positive act devolves upon one party, and a corresponding equitable right is held by another party."

But the Central Pacific did not take title to this land "subject to an equity" in favor of Olney. The Central Pacific was under no obligation to open the land-office—nor had it the power to open it; nor was it under obligation to file Olney's declaratory statement; nor did it induce him to waive the benefit (if any) of claiming settlement back of April 1869. No "*equitable ought*" rests on the Central Pacific towards Olney, or the defendant—they are, and have always been, *at arm's length*.

Provisions in the Act of 1864.

Section 4 of the Central Pacific's granting Act of 1864, after enlarging the extent of the grant made by the Act of 1862, provides that

> "Any lands granted by this Act, or the Act to which this is an amendment, shall not defeat or impair any *pre-emption*, homestead, swamp land, or other lawful *claim*."

Olney's *claim* was not defeated or impaired by the Central Pacific's grant. Seven months after the Central Pacific's grant attached Olney filed, claiming settlement initiated six months after that grant attached. The *claim* established by that filing, if lawful, was a claim of preference right to purchase the land.

The filing was *accepted*—it was not defeated by the grant. The grant had attached long before that filing, or the settlement claimed in it, were made. Olney asserted no other *claim*—he did not offer to purchase the land; nor is this a case in which the provisions of the Act of 1864 are invoked to preserve the claim of Olney, *as such*, against being defeated or impaired. This amendment, like section 2270 of the Revised Statutes, is for the benefit of pre-emptors—not for the benefit of third parties, like the defendant here.

Olney's *occupancy* prior to October 29th 1868 was not a "pre-emption claim"—hence, until he filed, he had no "pre-emption claim" to be defeat-

ed or impaired; nor did he, in any way, assert any claim for the land prior to April 23rd 1869—the date of settlement claimed.

Respectfully submitted,

L. R. Rogers,

Attorney for Plaintiff in Error.

Copy of Opinion for U.S. Court

Filed Jan. 18, 1900.

IN THE

Supreme Court of the United States

D. P. TARPEY,
Plaintiff in Error,

vs.

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119.

Error to the Supreme Court of Utah.

Additional Brief for Plaintiff in Error.

L. E. PAYSON,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

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ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This was an ejectment brought by Tarpey against Madsen, February 11, 1898, to recover one hundred and sixty acres of land in Utah; part of an odd-numbered section, lying within the primary limits of the grant of public lands made to The Central Pacific Railroad Company by acts of Congress of July 1, 1862 (12 St., 489) and July 2, 1864 (13 St., 356).

The Railroad Company duly filed its assent to the Act of July 1, 1862.

The land in question, part of Section No. 29, T. 11, R. 2 W., in Box Elder County, Utah, was public land, of the kind and character contemplated by said grants, is within ten miles, on the north side of that portion of the Central Pacific Railroad, which extends from Monument Point to Ogden, the map of definite location of which was filed and duly approved by the Secretary of the Interior, on October 20, 1868.

Upon this line the road was constructed and duly accepted prior to A. D. 1870.

There was not, on or prior to October 20, 1868 (the date of the approval of the map of definite location), any filings or claims of any kind or character against this land of record in the United States Land Office.

On August 17, 1891, the Central Pacific Railroad executed and delivered to Tarpey, the plaintiff, its deed conveying to him the lands in controversy.

The cloud upon this title in the plaintiff grows out of this state of fact and decision in the Land Department.

The land was surveyed on September 12, 1856.

On November 4, 1884, the Central Pacific Railroad Company filed its selection list, embracing this land, at the local land office, and paid all costs of surveying and other charges by it to be paid. (Trans., p. 8.)

On May 29, 1869, one Moroni Olney filed the usual "declaratory statement" of his intention to claim this land as a pre-emption right, alleging that he "had on the 23d day of April, 1869, settled and improved" said land, &c. (Trans., p. 9.)

The land office at Salt Lake was not opened until May 9, 1869.

In December, 1892, Madsen made a contest in the local land office against the selection of this tract by the railroad company; a hearing was ordered by the General Land

Office on January 18, 1893, to "determine the status of the land on October 20, 1868, when the right of the company attached."

A hearing was had in the local land office in August, 1893, with this result, by the Register and Receiver:

"We find that the tract in question, the SW. of ¼ Section 29, Twp. 11 North, Range 2 West, of the Salt Lake meridian, *was settled upon, and occupied and claimed by a qualified entryman, to wit, Maroni Olney, prior to October 20, 1868, which therefore excepted the land from the operation of the grant of Congress to the Central Pacific Railroad Company.*" (Trans., p. 10.)

The italics are mine; the emphasis is made because this is the action which has so far defeated the Tarpey title, and which is the basis of the argument to be made here, *pro* and *con*, upon the principal error assigned, viz.: "3. The Court erred in holding and deciding that the mere residence, settlement and cultivation of the land in dispute by Moroni Olney prior to October 20, 1868, exempted the land and the title thereto from passing from the United States to said railroad company." (Trans., p. 19.)

The case here hinges entirely upon that finding by the local land officer, affirmed by the Commissioner of the General Land Office, and the holding by the courts below that such state of fact, mere settlement and occupation, excepted the land from the operation of the Act of Congress making the grant to the railroad company.

Resuming, the Commissioner of the General Land Office, on appeal, on May 24, 1895, affirmed the finding and holding of the local land office.

He held, as the land was in possession of one "who had a right to assert a claim to the same on October 20, 1868, it follows, under the established rulings of this Department, that this settlement was a segregation of the land inquestion, and

that it was thereby excepted from the operation of the grant to the Company," citing a number of cases from the "Land Decisions" in support of that view.

This was the decision referred to, in Trans., p. 10.

On June 20, 1896, Madsen made homestead entry of this land (Trans., p. 8), and on August 21, 1896, a patent on this entry was executed to him, which is his evidence of title in the suit.

The findings of the court below are full, and not necessary to be set out at length here. In substance they are, that, but for the possession by Olney, on October 20, 1868, which so segregated the tract that it was excepted from the grant (as the court held), the title of plaintiff as grantee of the railroad company was good.

The evidence of Groo, register of the local land office, carried into the findings of the court, is this:

"The records of the land office, now in my possession and produced here, show that on or before October 20, 1868, there was not any pre-emption, homestead, or other claim, or filing of any kind or character, or description whatsoever, upon or against this land in controversy." (Trans., p. 8.)

After the filing of his "declaratory statement" in May, 1869, nothing was done by Olney, his claim was abandoned, so far as appears.

It may be said that there is no dispute in this record over any question of fact.

The case was tried in the District Court without a jury; after the proofs were in showing the foregoing, with some other facts not deemed necessary now to notice, the court nonsuited the plaintiff, "upon the ground that the evidence shows the title to the land in controversy to be in the defendant, and that at the time of the beginning of this action the title to the land in controversy was in the United States of America." (Trans., p. 11.)

In the Supreme Court of Utah, to which an appeal was taken, the decision was again against the Tarpey title. (Trans., p. 13.)

The opinion of that court in substance was this:

The plaintiff claims title by virtue of a deed from the Central Pacific Railroad Company to him, and the grant to that company by the United States in the Acts of Congress of 1862 and 1864 reciting them.

The court calls attention to the exception in the third section of the Act of 1864, that the grant shall not defeat or impair any pre-emption, homestead or other lawful claim nor include the improvements of any "*bona fide*" settler.

The court finds regularity in proceedings by the railroad company, and that the map of definite location of line of railroad was duly filed and approved October 20, 1868, that the land was within the 20-mile limit, &c.

The court says (p. 13): "It was within the grant unless a pre-emption right had lawfully attached to it at the time the line of the road was definitely fixed, and the survey thereof had been filed in the office of the General Land Office."

So that in the Supreme Court of Utah precisely the same question was presented as is presented here on the third assignment of error. (Trans. p. 19.)

The court proceeds to recite what appears from the record, as to Olney's occupancy of the land in 1868, and of his filing his claim in May, 1869, and that the delay in filing was caused because the office was not open.

The court then recites the provisions of the pre-emption law (Sec. 2265, R. S.), that every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known *his claim, in writing*, to the register of the proper land office within three months from the time of settlement, *giving* the *designation of the tract and the time of settlement.*

The opinion then concludes the matter (p. 15):

> "It appears from the record that Olney filed his declaratory statement with the Register in less than a month after the office of Register was filled. *Having settled upon the land in question before the railroad company established its line of definite location* and filed its survey or map thereof in the General Land Office, *and having filed his declaratory statement with the Register of the land office of the district within the time allowed by law*, we must hold that *Olney's pre-emption claim had attached* to the land in question, *and existed thereon before the right of the Central Pacific railroad became fixed*, and that the land in dispute did not pass by the grant relied on."

Further on page 16 the Court said:

> "When Olney, the pre-emptioner in this case, filed his declaratory statement, his right must be deemed in law to relate to the *date of his settlement* on the land in dispute. Therefore, he had a *lawful claim* upon it when the grant to the railroad took effect, and the land in dispute was not included in it. The grant of land to the Central Pacific Railroad Company took effect when the line of definite location of its road was made, and the survey filed in the General Land Office, but it did not include the land in dispute, because it was at that time subject to the lawful right of Olney, a pre-emptor.
>
> But when he failed to comply with the requisites imposed in order to obtain title, the land became again a part of the public lands of the United States, and was subject to the homestead entry of defendant Andrew Madsen, or to any other entry or pre-emption."

So the Court held that the patent to Madsen passed the title to him, and affirmed the judgment.

These somewhat extended quotations and statements from the record are made so that the Court may have concisely

before it the undisputed facts, viz, that the map of the definite location of the Central Pacific Railroad was duly filed and approved October 20, 1868; that at that date there was no pre-emption, homestead or other claim or filing of any kind, character or description against this land; that it was, so far as the Land Office records showed, free and clear public land in an odd-numbered section; that although Olney was in possession of the land on that date, he took no steps in the Land Office in any way until he filed the usual "declaratory statement" in pre-emption on May 29, 1869, in which paper he alleged that his settlement began on April 23, 1869, almost six months after the approval of the map of "definite location."

That this mere residence and occupation, *as a fact*, on October 20, 1868, by Olney, exempted the land from the grant, as a matter of law, has been the holding of both courts below, thus affirming the title in Madsen because of his homestead entry, initiated June 20, 1896, followed by patent thereon August 21, 1896.

Madsen is in no way connected with Olney; he is a stranger to any proceeding by the latter; but he claims the right to show that although Olney only claimed, for the purpose of his, Olney's, pre-emption, that the settlement therefor was made on April 23, 1869, that Olney was mistaken in this, or, rather, that Olney in fact settled before or on October 20, 1868, and that such occupancy should be held to enure to the pre-emption claim, although not claimed therefor by Olney, excepting thus the land from the grant; so that he, Madsen, causing such proof to be made, could homestead the land nearly eight years afterwards.

ARGUMENT.

The status of the land at the time of the definite location of the road constitutes the criterion by which the lands to which the company is entitled are to be determined.

Until there is a filing or entry in the United States Land Office, no pre-emption or pre-emption claim had attached, and there was neither filing nor entry on October 20, 1868, when the line of the Central Pacific Railroad was definitely fixed.

In this argument it will be assumed that no citation of authorties is necessary upon these points:

1. That in a railroad land grant, acceptance of the act by the railroad company, followed by definite location of line, vests the title in the company of all public lands within the terms of the grant as of the date of the grant.

2. As the line of road in this case was "definitely fixed" on October 20, 1868, then all such public lands as were not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at that date, became, on that date, the property of the railroad company, as of the date of the Act of Congress making the grant, and the deed of the company to plaintiff gave him a *prima facie* right of recovery below.

3. The determination by the land officers of the United States, that "the land in question was settled upon, occupied and claimed by a qualified entryman prior to October 20, 1868," is only the ascertainment of a question of *fact*, and their conclusion that such fact would except the land from the grant was a decision on a matter of law which did not conclude the parties, and left the question open to review in the courts.

4. Under the Pacific Railroad acts of 1862 and 1864, no

pre-emption claim can be held to have attached to lands under the exceptions in the acts by mere settlement, residence or cultivation ; there must be a proceeding in the proper land office by which the pre-emption right is initiated, and until there is a filing or entry in the United States Land Office, there is no pre-emption or claim, or pre-emption claim "attached."

5. If a lawful, valid pre-emption claim under the law had not attached to this land on October 20, 1868, the subsequent ruling of the land officers that, as a matter of law, such a claim had attached, and such ruling resulted in a patent to defendant, the validity of such patent may be questioned and determined in this suit.

None of these questions are now open.

Upon this record and the assignment of errors therein, it only remains to discuss the effect of the filing by Olney of his declaratory statement in May, 1869, alleging settlement in April, 1869, coupled with the fact of occupancy in October, 1868, as against the railroad title in Tarpey found by the court below to be good, except for this claim by Olney.

There is no dispute as to fact in this case. It was not denied below, it will not be denied here, that the courts below both found that the land in dispute was within the limits of the Central Pacific grant ; that the records of the Land Office showed that on October 20, 1868 (the date of due definite location of line) there were no claims or filings of any kind upon or against this land; that so far as the records showed it was clear public land on that date, and therefore the title passed to the railroad company, unless, as was said by the court below, "it was within the grant, unless a pre-emption right had lawfully attached to it," on this date, by the fact of *occupancy* by Olney, together with his "declaratory statement," as a proposed pre-emptor made

May 29, 1869, *alleging* settlement April 23, 1869. It will be remembered in this connection that this was the beginning and ending of Olney with this land. After the filing of the declaratory statement he disappears and his claim was abandoned.

More than twenty-three years afterwards, in 1892, Madsen makes a contest against the railroad company, not because of any relation between himself and Olney, but, invoking the rule that a lawful pre-emption right attaching to land within a railroad grant, at definite location, excepts the land from the grant, and leaves it open for the first qualified applicant, he, to secure the land sets up and proves Olney's relation to the land, as stated, and secures the patent, because of the Department rulings cited above.

The adoption of these rulings by the courts below gave Madsen the judgment appealed from.

In the adjustment of the various land grants to railroad companies made by Congress, in the Department of the Interior, the question as to the effect of occupancy alone, before definite location, upon lands within the limits of the grant was presented very early.

Until the decision of *The N. P. R. R. Co.vs. Colburn, 164 U. S., 383*, the excepting clause in the several grants was uniformly construed to include all lands in the actual occupancy of a person at definite location of line of railroad who had the qualifications to make entry under the public land laws not only without proof of any subsequent filing or entry, based upon such occupancy, but without proof of the intention of the party in possession to make any formal claim to the land.

The *Colburn* case is entirely decisive of this it is submitted ; but the factor appearing in the case that Olney did make a formal beginning of proceedings for this land, although subsequent to definite location by the railroad

company, so that a formal filing did appear of record, although six months too late, which will doubtless be urged by appellee here, seems to require notice.

On this state of case three questions are presented on the third assigned error, which error really covers the whole case. For convenience it is repeated here.

"3. The court erred in holding and deciding that the mere residence, settlement and cultivation of the land in dispute by Moroni Olney, prior to October 20, 1868, exempted the land and the title thereto from passing from the United States to said railroad company." (Trans., p. 19.)

The questions may be thus stated :

1. Was not the claim made by Olney, in his declaratory statement as to residence, so long as he permitted it to stand, conclusive, especially as to third parties; in other words, can third parties be permitted to set up a different claim than that made by the proposed entryman to enure to their benefit?

2. As in Olney's declaratory statement, he only claimed that he made settlement on April 23, 1869, and as he abandoned the proceeding after that filing, was it proper, in the contest initiated in the land office in 1892, by Madsen, to hold that by proof of the fact of occupancy by Olney in October, 1868, Olney's pre-emption claim "attached" to this land at that date?

3. If the land was within the grant, as found by the court below (Trans., p. 13), unless a pre-emption right had lawfully attached to it on October 20, 1868, could such right attach, under a declaratory statement made and filed in the local office in May, 1869, alleging settlement in April, 1869?

Occupancy, with qualification of the entry man, was held uniformly by the Interior Department to be the initiation

of a pre-emption claim, and that by such occupancy a pre-emption claim attached to the land.

Scores of such decisions have been made and the railroad claim rejected.

To such a refinement did this course of decision progress that it was held in a class of cases in the Land Office, that the mere going upon a tract of land year by year to cut wild hay, living in a covered wagon upon it during the haying season, but having a house and home in a not remote village, was such an occupancy as to except the land from the grant under consideration.

Many of the subordinate courts of the country have had cases before them involving this question of whether by occupancy alone a pre-emption claim could attach to public land; generally, as in this case in the courts below, the ruling of the Interior Department was followed. This line of decision in the Department of the Interior was not interrupted until the decision of this court in *The Northern Pacific Railroad Co. vs. Colburn*, where, for the first time, the question was so clearly presented and decided that no strained construction was possible.

In that case (p. 386), this Court said decisively, "no pre-emption or homestead claim attaches to a tract, until an entry in the local land office."

Notwithstanding the clear opinions in *The K. P. R. Co. vs. Dunmeyer, 113 U. S., 629; Hastings & D. R. Co. vs. Whitney, 132 U. S., 357; Whitney vs. Taylor, 158 U. S., 85; Lansdale vs. Daniels, 100 U. S., 113, and Maddox vs. Burnham, 156 U. S., 544*, the Department of the Interior continued to hold that by mere occupation, with qualification to enter, on the part of the entryman, at definite location of railroad line, a pre-emption claim "attached" to public land, so as to except it from the railroad grant, until the decision in the Colburn case.

The Court will recall the earnest effort made by the Secretary of the Interior and the Attorney-General of the United States to secure a reversal, on a re-argument and re-submission, of the *Colburn* case on brief prepared in the Department and endorsed by the Solicitor-General.

The effort failed ; the Court stood by its decision and the reasoning therefor, so that the law is well and clearly settled for like cases. The *Colburn* case is now being followed by the Department.

What then is the case here?

The Court below found (Trans., p. 13), as to the land, "It was within the grant unless a pre-emption right had lawfully attached to it at the time the line of the road was definitely fixed, and the survey thereof had been filed in the office of the General Land Office," October 20, 1868.

Sustaining this, is the fact found by the trial court (Trans., p. 8), that the land office records showed that on that date there were no claims or filings of any kind whatsoever, against this land.

This of course made a clear case for plaintiff.

To meet it, defendant was permitted to prove the "declaratory statement" of Olney, of May 29, 1869, alleging settlement with a view to pre-emption purchase, on April 23, 1869.

Obviously, this was clearly insufficient to prejudice plaintiff's title, because it was subsequent to the vesting of title under the grant, in the railroad company by definite location October 20, the previous year.

So defendant to meet that dilemma, is permitted to make proof that, in a contest against the railroad selection, in the local land office in 1893, it was found that the land was occupied and settled upon "by a qualified entryman, Maroni Olney, prior to October 20, 1868, *which therefore excepted the land from the operation of the grant* of Congress to the Central Pacific Railroad Company."

The italics are mine, and as stated above, in the statement of the case here, the emphasis is made, because this finding of the fact of mere occupancy (without any written notice of claim or intention to claim, or any "declaratory statement" filed in the local land office ever making such occupancy the basis of a proceeding to secure the land under the pre-emption law), and the conclusion as to the effect of such occupancy, is the action which has thus far defeated the plaintiff's title, as similar findings and conclusions have defeated railroad title in hundreds of cases in the Department before the decision of the *Colburn* case.

Now, in this case, as in Colburn's, there was occupancy, with qualification, and that alone at definite location of railroad line. In each case the land was free and clear of any record claim or notice of claim when the grant became effective by definite location.

The only difference in the cases is, that Kelly, the occupant in Colburn's case, made no filing, while here Olney, the occupant, did make a filing; but made, however, in his claim, such a case as was utterly valueless, even for himself much less for a stranger, as is Madsen.

So the three questions suggested on page 11 *supra*, possibly should be discussed.

1. Was not the claim made by Olney in his declaratory statement as to residence so long as he permitted it to stand, conclusive, and especially as to third parties; in other words, can third parties be permitted to set up a different claim than that made by the proposed entryman to enure to their benefit.

The statute, Section 2265 (cited Trans., p. 14), provides that every claimant under the pre-emption law for land not yet proclaimed for sale is "required to make known his claim in writing to the register of the proper land office within three months from the time of settlement, giving the designation of the tract and the time of settlement," etc.

Section 2270 provides for a condition where, by vacancy in office, the claimant cannot comply with all the requisites of the law within the appointed time, he may have the same period after the disability is removed.

This of course relates to the times of filing of necessary papers, and action between the proposed entryman and the local land officers.

This section is clearly for the benefit of a pre-emptor who is seeking to sustain his own filing, against delay in presenting it; but the requisites of the "declaratory statement" are not changed; he must make known his claim in writing, giving the time of his settlement, just the same no matter when the actual filing shall be made.

This is for obvious reasons. It is a matter of common knowledge that temporary occupancy of public lands for grazing, cutting hay, farming, hunting, etc., etc., commonly called "squatting," is as old as the public land system. Such occupancy no matter how long continued never gave any right to the land.

Whenever the occupant determined to avail himself of the privilege of the public land law, and assume the burden of payment under the pre-emption law, or of continued improvement and cultivation under the homestead law, that condition of mind and intention must be shown upon paper and made a matter of record, by a declaratory statement in pre-emption, and actual entry in homestead cases.

He may have been in possession for years without intention of becoming a purchaser; he was only a "squatter," he had no more rights to the land at the end than at the beginning; but as soon as he becomes a claimant for the land under the pre-emption law, the statute requires that he "put in writing *his claim*," and "*the time of settlement*," for the purposes of that claim. It is a necessary statement, because "required" by the Statute; it is made upon knowl-

edge, because the claimant knows when he determined that occupancy should be the basis of the pre-emption claim; it is conclusive, so long as it stands, because it is the record of of his claim, made by him, and so long as it is unchanged of record his claim stands or falls by it.

This, it is submitted, is perfectly clear and certain as to him, and therefore as to third parties.

In this case, Olney, in 1869, puts upon record his "claim" under the public land laws; in it *he* avers that his settlement for the purpose of the claim was made on April 23d of the same year.

No matter if he had been in possession in fact longer, he formally declares to the land officers in his statement of his "claim" that his settlement for that purpose began on April 23, 1869, and in his formal statement he asserted no claim to this land by reason of anything he had done prior to that date.

But Madsen, hoping to secure the land, in 1892 brings proof that, in fact, Olney was on the land in 1868. Granted; but what of it? Presumably as a squatter, because *he*, who knew, made no claim otherwise, although it was to his interest to make claim of earlier occupancy with intention to purchase, if such were the fact. When called upon to put his case on paper he solemnly averred that the date of his "settlement" was April 23, 1869.

This is the "claim made known in writing to the register" under the statute. He asserted no claim to the land by reason of anything he had done prior to that date; and until the filing of that declaratory statement in the proper land office there was no "pre-emption claim" to attach to this land. The pre-emption claim which did attach, if any, was the one the claimant Olney chose to make for himself.

It was held in the Department, that as Olney *was* occupying the land on October 20, 1868, he *might* have claimed

settlement on that day. Granted; but it is the claim which he *did* file, not one which, *possibly*, he might have filed, that is to be considered here. He *might* have been occupying more than 160 acres of land; he *might* have designated other land; the fact of what he *did do*, and what he *did claim*, is the only proper basis of consideration here.

Olney, with full knowledge, made his claim as best suited him; he was content with it; he, undoubtedly, soon learned that, as against the action of the railroad company in definitely locating, on October 20 of the previous year, his claim was valueless; because it was never pressed. It ended with the making; was, in fact, abandoned by Olney.

In this record, Olney's claim stands as he made it; there is no pretense of evidence or finding that it was not true. Therefore it is conclusive upon all claiming directly or indirectly under it.

Especially should this be so as to Madsen. Not until 1892, twenty-four years after the railroad title attached; more than a year after Tarpey bought and took title under the railroad company, did Madsen begin a contest, in order to permit him to enter the land if successful.

He resurrected proof of the fact of prior occupancy, and invoking the ruling of the Department upon such fact, now thoroughly exploded by the decision of this court in the *Colburn* case, has succeeded in getting favorable decisions upon his unconscionable claim.

How can he be heard to insist that Olney did not know just what he had a right to claim; or that he, Madsen, should be benefitted, by overturning our title, because it may be *guessed* that if Olney had made a different claim, he might have succeeded.

No, your Honors, this case must be tried as to that question, upon what Olney *did* claim, with which "claim" he was content, and upon which he rested, and which claim, instead of amending, or trying to perfect, he abandoned.

If this be so, Olney's settlement as to the pre-emption claim rests upon the record he made, as of April 23, 1869.

Now, the status of the land at the time of the definite location of the road constitutes the criterion by which the lands to which the company is entitled are to be determined.

Van Wyck *vs.* Knevals, 106 U. S., 360.
K. P. Ry. Co. *vs* Dunmeyer, 113 U. S., 629.

By any deduction from the undisputed evidence in this record on October 20, 1868, when the Central Pacific grant took effect as to this part of its line, Olney was a mere "squatter," nothing more; he was in possession; only that.

There is nothing in the record tending to show that Olney ever made claim inconsistent with the charge here that on October 20, 1868, he was merely a "squatter." The only claim ever made by him was in his declaratory statement in May, 1869, that he made settlement under the public land laws in April, 1869.

2d. The second question, viz, "As in Olney's declaratory statement, he only claimed that he made settlement on April 23, 1869; and as he abandoned the proceeding, after that filing, was it proper in the contest initiated in the land office in 1892 by Madsen to hold, that by proof of the fact of occupancy by Olney in October, 1868, Olney's pre-emption claim had attached to this land at that date?" it seems, is easily answered, in view of the recent decisions of this Court.

Such holding was made by the Department, because of the previous rulings referred to and tenaciously adhered to, that mere occupancy, with qualification to enter, by the occupant, excepted the land from the grant, because (as was held) by such occupation the pre-emption right "*attached.*"

But in the *Colburn* case it is said, "But frequent decisions of this Court have been to the effect that no pre-emption or

homestead claim attaches to a tract until an entry in the local land office."

The decision of the Register and Receiver made in 1893 (and affirmed by the Commissioner of the General Land Office), as follows: "We find that the tract in question * * * was settled upon and occupied and claimed by a qualified entryman, to wit, Moroni Olney, prior to October 20, 1868, which therefore excepted the land from the operation of the grant to the Central Pacific Railroad Company," was clearly erroneous as a matter of law, and this Court must review it and decide the question for itself.

Therefore the proof was improper and irrelevant, to any question of right, under the filing by Olney; its only effect would be to determine the *fact* of occupancy which would conclude the parties probably, if such fact were ever of importance. The legal deduction, however, was and is open to review, and has been, as shown, overruled by this Court.

N. P. R. R. Co. *vs.* Colburn, *supra.*

That a pre-emption has "attached" cannot be shown by parol proof of occupation and qualification of the occupant, is now settled law, and the proof was improper, not only in the Land Office but in the court below.

The third question also is easily answered, as the argument on the first really concludes this.

It may, however, be added that on October 20, 1868, the definite location of the railroad line identified the lands granted, and on that day the legal title for this tract did or did not pass to the Central Pacific Railroad Company. The status of the land, as it appeared of record, would determine this.

Both courts below have found that this tract was clear of all claims of record and of the character that would pass by the grant.

If the tract was granted; if the grant became effective on that day, no pre-emption claim could thereafter attach to it, and no subsequent action by Olney, based on alleged acts by him for that purpose, subsequent to October 20, 1868, could in any way affect the land so granted and the title so vested.

In the light then of the opinion in the *Colburn* case the language of Mr. Justice Miller in the case of *The K. P. R. Co. vs. Dunmeyer* may be emphasized, remembering that the same land grant is involved in this case as in that.

> "Of all the words in the English language this word '*attached*' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right was initiated. It meant that by such a proceeding a right of homestead had fastened to that land."

In *Lansdale vs. Daniels, 100 U. S., 113*, quoted approvingly in the *Colburn case, 164 U. S., 385*, it is said: "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that settlement alone is not sufficient for that purpose."

Therefore conclusively on October 20, 1868, Olney was a mere "squatter" nor could have any standing as a pre-emptor.

Possibly it may be urged that as the local land office was not opened until March 9, 1869, that Sec. 2270 R. S. cited above will aid or excuse Olney for not making an earlier filing.

What has been said above (p. 15) as to this with the suggestion, on pp. 17 and 18 of the brief of my associate, Mr. Rogers, already on file, covers this point if made. In no way can this section relieve the difficulty that in his declaratory statement Olney makes a case as to date of settlement subsequent to the date of the railroad title, and hence valueless.

It has been very unfortunate that the Secretary of the Interior at so early a day made the erroneous rulings which were finally corrected by this Court by its decision in the Colburn case; equally so, that many inferior courts adopted those rulings as judicial constructions of the excepting clause of this and similar grants.

Such decisions worked the errors complained of in this case. (Trans., p. 19.)

No technical questions of proofs or lack of proof can be raised here on this record; no cross errors are assigned.

The courts below both found that this land was "granted land" to the Central Pacific Railroad Co., unless the facts found as to Olney's occupation and attempted pre-emption (as to which there is no dispute) were such that in law, a lawful pre-emption claim by Olney had attached to this land on October 20, 1868.

To reach that conclusion the Court was compelled to hold and did hold and decide that the mere residence, settlement and cultivation of the land by Olney prior to October 20, 1868, excepted the land from the grant, and prevented the title thereto from passing from the United States to said railroad company.

This was clearly error; it was upon the controlling question in the case, and for that error, the judgment below should be reversed.

Respectfully submitted,

L. E. PAYSON,

Of Counsel for Appellant.

Since the foregoing was printed, the brief of defendant in error has been filed ; for convenience a brief review of it is appended here.

The statement of defendant on page 3 of that brief, that, " The claim of the plaintiff in error is in effect that the land passed to the company for the reason, that on October 20, 1868, the alleged date of definite location, there was no filing of public record," is not quite accurate.

We further insist that the claim which Olney *did* make, in writing, for the purpose of advising the Land Department of just what he did claim, viz ; that he made settlement on this land, for the purpose of pre-emption entry, on April 23, 1869, is the only one which can be considered as against plaintiff. This claim Olney has permitted to stand ; it has never been changed ; it has never been proven to be untrue, and our further claim is, that so long as Olney permits it to stand, a third party, a stranger to Olney, as Madsen is, cannot set up, upon inference, a different claim than Olney himself made.

It is no answer to say that the statute then in force as to withdrawn lands in railroad limits ; no declaratory statement was necessary referring to the act of March 27, 1854. It may be remarked that it is quite clear that it was not the intent of Congress to dispense with declaratory statements, in preemption cases under that act, because Congress, upon knowledge that the Secretary of the Interior was so construing the act, promptly passed the act of July 14, 1870 (16 Stat., 279, Sec. 2), that nothing in the act of 1854 should be construed as to relieve settlers from the obligation to file the usual declaratory statements.

Whether that be so or not, whatever Olney's claim was,

it was pending when this later act was passed, and had he applied to enter the land, a declaratory statement would have been necessary. As he abandoned the proceeding upon its beginning (for it never progressed after May 29, 1869), and as *he* saw fit to reduce his claim to writing and file it at the local land office, even if he were not compelled to do so by existing regulations, still he did so; has stood by it, never changed it; for aught appearing, it stated the true fact, with which he has been content, and therefore, Madsen, a stranger, 23 years afterwards, cannot be heard to set up, as a *fact*, a different state of case to secure this land, the title to which, if the statements in Olney's paper are to be taken as true, is, unquestionably, under this record, in the plaintiff in error.

We are content with the suggestions in our additional brief on page 11 *et seq.* on this point, when it is kept in mind that Madsen is only to be allowed to take advantage of the situation that Olney created, and as Olney left it.

Madsen is not in interest with Olney. He cannot amend Olney's papers, and, as one succeeding in a meritorious way, make a new amended case for Olney; not at all.

If the record as to this land, as it stood and stands, did not give Olney the right to it on October 20, 1868 then Madsen, fails.

Again, we need only repeat, as to the point made on page 8 of defendant's brief, "that plaintiff did not negative the exceptions in the grant to the railroad company;" no technical questions of proofs, or lack of proof, as to plaintiff's title can be raised on this record.

Both Courts below found that this land was "granted land to the Central Pacific Railroad Co.," unless the facts found as to Olney's possession and attempted pre-emption (as to which there is no dispute) were such that a "lawful

pre-emption claim" by Olney "had attached to this land on October 20, 1868."

On the record, as made, the 3d assigned error is presented for discussion and decision here, viz, that the Court erred in holding and deciding that the mere residence, settlement, and cultivation of the land in dispute by Moron Olney prior to October 20, 1868, excepted the land and the title thereto from passing from the United States to the railroad company. (Trans., p. 19.)

That was the question below; it was decided against plaintiff. The Court below held "the land was within the grant, unlesss a pre-emption right had lawfully attached to it," and that the facts recited constitute a valid pre-emption claim.

No cross-error is assigned, and so the precise question, under the 3d assigned error, is presented here.

Remarking, that the only additional point, that on page 10 of defendant's brief, viz, that "the Department allowed a declaratory statement to be filed on this land in 1869, thereby deciding that it was not railroad land," is hardly worthy of serious notice. Our additional brief contains all that we desire to submit upon the third assigned error.

Respectfully submitted.

L. E. PAYSON,
Of Counsel for Plaintiff in Error.

No. 119.

FEB 5 1900
JAMES H. McKENNEY,

Supp. Brf. of Payson for D.E.

119.

In the Supreme Court of the United States.

Filed Feb. 5, 1900.

D. P. TARPEY,
Plaintiff in Error,
vs.
ANDREW MADSEN,
Defendant in Error.

Error to the Supreme Court of Utah.

Supplemental Brief for Plaintiff in Error

By Leave of Court.

L. E. PAYSON,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

D. P. TARPEY,
Plaintiff in Error,
vs.
ANDREW MADSEN,
Defendant in Error.

Error to the Supreme Court of Utah.

Supplemental Brief of Plaintiff in Error.

Upon the oral argument of the case, Mr. Justice Harlan made this enquiry: The defendant having a patent to the land involved, can its validity be questioned by a suit in ejectment; must not resort be had to equity, to hold defendant as trustee?

As that point had not been presented below, nor in brief for defendant here, no reference was made in the briefs for plaintiff in error; so by leave of Court, this supplemental brief is filed.

Under a railroad land grant, title attaches, as of the date of the grant, upon definite location of line; no patent to the railroad company is necessary, and ejectment will lie, by the grantee of the railroad title.

Deseret Salt Co. *vs.* Tarpey, 142 U. S. 241.

The railroad title is equivalent to, and as complete, upon approval of the map of definite location, by the Secretary

of the Interior, as a "patent" title—and the officers of the Land Department are fully advised by these records of this situation, that the land is "disposed of" by the grant.

Wright *vs.* Roseberry, 121 U. S., 428, was an ejectment. The plaintiff claimed, as grantee under the State, the title to the premises as "swamp and overflowed land," under the Act of Congress of September 28, 1850, 9 Stat., 519; the defendant, under a patent in a pre-emption proceeding under the public land laws.

It was decided that the Swamp-Land Act of September 20, 1850, operated as a grant *in præsente* to the State of all swamp land within it, passing the title as of its date, requiring only identification to render the title perfect.

(Precisely as under a railroad land grant.)

The case was remanded for a new trial "when the parties will be at liberty to show whether or not the lands in controversy were *in fact* swamp and overflowed on the day that the swamp-land act of 1850 took effect. If they are proved to have been such lands at that date they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States."

Exactly a parallel case with this as to relation of parties toward the subject-matter.

Upon the enquiry in hand, viz, the right of a plaintiff, under a Congressional grant, to question a patent to defendant, issued under the general land laws in ejectment, the subject is fully discussed in the opinion and definitely settled.

The Court say:

"It would be a most extraordinary doctrine if the holder of a conveyance of land from a State were precluded from establishing his title simply because the United States may have subsequently conveyed the land to another, and especially from showing that years before they had granted

the property to the State, and thus were without title at the time of their subsequent conveyance." "A grant has been frequently issued by the United States for land which had been previously granted and the second grant has been held inoperative."

So in *Burfenning vs. C. St. P., &c., Ry. Co. 163, U. S. 321.* Where, in an ejectment, plaintiff relied upon a patent in a homestead proceeding, the patent was defeated.

The Court say:

"But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law."

So in *Morton vs. Nebraska, 21 Wal. 660,* on p. 674:

"It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale or appropriated are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

See also the reasoning in *Colburn vs. N. P. R. R. Co.,* 164 U. S. 388.

Upon another enquiry made from the Bench, as to the line of authorities, relating to a "declaratory statement" and its qualities and effects, this is submitted:

1. This land was "unoffered land," or land "not yet proclaimed for sale."

The statute (sec. 2265, R. S.) is, "Every claimant under the pre-emption law for land not yet proclaimed for sale is *required* to *make known his claim in writing* to the register of the proper land office within three months of the time of

the settlement, *giving the designation of the tract* and *the time of settlement,*" etc.

(The italics are mine.)

The claimant is *required* to set up, or make known *his* claim under the pre-emption law; in writing within the specified time of *the* settlement under which he claims, and *describe the land* and the *time of settlement.*

These are all fundamental conditions; he is under precisely the same requirement to state the *time* of his settlement, as to *describe* the land; precisely; neither is of less importance than the other.

I quote from *Whitney vs. Taylor, 158 U. S. 85,* as to pre-emption claims:

"Settlement is the initial fact." "In this respect a pre-emption d ffers from a homestead, for the entry in the land office is in respect to the latter, the initial fact." "But it is also true that settlement alone, without a declaratory statement, creates no pre-emption right.

Such a notice of claim, or declaratory statement, is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose."

"And the filing of this declaratory statement was, in the strictest sense of the term, the assertion of a pre-emption claim, and when filed and noted it was officially recognized as such." (Page 94.)

"Indeed this declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title." "It is true one must be verified, the other need not be." (Page 95.)

"At any rate Congress has seen fit not to require an affidavit to a declaratory statement, and has provided for the filing of such unsworn statement as the proper means for an assertion on record of a claim under the pre-emption law, and that is all that is necessary to except the land from the scope of the grant." (Page 96.)

All this shows that compliance with the requirements of the statute is substantial, and *only* when the declaratory statement shows on its face as against the status of the land a right to the pre-emptor to claim it can it except the land from the grant, by the record thus made.

So long then as Olney permitted the statement to stand as to the time when he determined to avail himself of the privilege and assume the burden of payment under the statute, that averment must control *him* and *he* has never, so far as this record discloses, disaffirmed the *claim made in writing*, as to *the* settlement, that it was April 23, 1869.

The *claim* was solemnly and considerately made by Olney. It will be remembered that counsel for defendant, on the oral argument, deliberately stated when Olney's declaratory statement was presented for filing the local land officers had an *ex parte* hearing as to the right of Olney so to do, and the filing was the result of that hearing, so that the presumed deliberation of Olney in the preparation and filing of the paper is emphasized.

The finding of fact by the local land officers, in August, 1893, on Madsen's application to enter, made more than 24 years after Olney's action, and necessarily based on hearsay given by neighbors, certainly cannot overturn the formal written statement of Olney, made for the purpose of making his pre-emption claim and signed necessarily after the hearsay matters testified to by neighbors.

It was improper for the local land officers to take testimony as to Olney's claim, in his absence, against his written claim which then and still makes the "record" of this pre-emption claim. While the finding of the land officers, *in a proper case*, is conclusive, whenever the fact is essential, it cannot be so in this case, because Olney was not a party and was not heard; because Olney's case was in writing, formally made and with it he was and is content.

Madsen is a stranger, not claiming through or under Olney, but because of Olney's case, whatever *it* was; that case Olney deliberately made and stood by. Confessedly as made by *him*, it did not affect the Central Pacific grant as to this land because that attached October 20, 1868.

Madsen did not begin his attempt to secure this land until 1892, twenty-four years and five months after the definite location of railroad line, and attaching of railroad title; twenty-three years and seven months after Olney made and abandoned his filing; eight years and one month after the Central Pacific Railroad Company selected the land; and one year and five months after Tarpey received his deed.

Can the title to this land be left to rest, *in parol*, during all these years—almost a generation—to be resurrected and made to depend upon recollection of witnesses as to what Olney said and did, before he made his formal statement as to his real intentions?

The statute required him to make the statement; he did so, and is content with it; so long as it stands unrevoked and unchanged by him, his case stands or falls with it.

Upon the point made, that the record does not show that the land in suit was not proved not to be within all the exceptions named in the statute, I submit that the proofs do so show, when the whole record is read.

Moreover, Madsen claims the land under the homestead laws, and his patent was issued on his homestead entry. Now, any land subject to homestead entry is subject to railroad grant, and Madsen cannot question it.

Respectfully submitted,

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Of Counsel for Plaintiff in Error.